No. 86 1778

IN THE

Supreme Court of the United States

October Term, 1986

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

THE NASSAU COUNTY REPUBLICAN COMMITTEE and THE TOWN OF HEMPSTEAD REPUBLICAN COMMITTEE,
Defendants-Petitioners,

against

LORRAINE C. CULLEN; JOHN L. JUND; and MICHAEL LANDI, on behalf of each, and on behalf of all persons similarly situated; namely, those employees of the County of Nassau; the Towns of Hempstead, and Oyster Bay; and the Village of Hempstead, who have been subjected to solicitations for campaign contributions to the Republican Party in an inherently coercive manner or who have been subjected to scrutiny by officials of the Republican Party in connection with their hiring, employment or promotion; and CIVIL SERVICE MERIT COUNCIL OF LONG ISLAND,
Plaintiffs-Respondents,

and

THE TOWN OF HEMPSTEAD and THE COUNTY OF NASSAU,
Defendants-Respondents,

(caption continued on inside cover)

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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and

JOSEPH P. MARGIOTTA, JR., individually and in his capacity as Chairman of the Nassau County Republican Committee and the Chairman of the Town of Hempstead Republican Committee, FRANCIS T. PURCELL, individually and in his capacity as County Executive of the County of Nassau and past Presiding Supervisor of the Town of Hempstead; THE NASSAU COUNTY REPUBLICAN COMMITTEE; THE TOWN OF HEMPSTEAD REPUBLICAN COMMITTEE: THE VILLAGE OF HEMPSTEAD REPUBLICAN COMMITTEE, STANLEY DRAUSE, individually and as Finance Chairman of the Nassau County Republican Committee; ANDREW J. PARISI, HOWARD LEVITT and EASA EASA, individually and as Finance Chairman of the Town of Hempstead Republican Committee; RALPH CASO, individually and in his capacity as Past County Executive of the County of Nassau and past presiding Supervisor of the Town of Hempstead; DONALD WOOLNOUGH, individually, in his capacity as an employee of the Nassau County Republican Committee, and as an agent of Joseph P. Margiotta, Jr.; ARLENE MATHEWSON, individually, in her capacity as an employee of the Nassau County Republican Committee, and as an agent of Donald Woolnough and Joseph P. Margiotta, Jr.; ISABEL DODD, individually, in her capacity as an employee of the Nassau County Republican Committee, and as an agent of Joseph P. Margiotta, Jr., ROBERT D. LIVINGSTON, JR., individually and in his capacity as a member of the Town of Hempstead Republican Committee and the Executive Leader of the Village of Hempstead Republican Party: MURIEL DELAC, individually and in her capacity as Director of Personnel of the Town of Hempstead; HAROLD BRAUN, individually and in his capacity as Director of Personnel of the Town of Hempstead; SIDNEY ROSENTHAL, individually and in his capacity as Chairman of the Hempstead Civil Service Commission; ADELE LEONARD, individually and in her capacity as Chairman of the Nassau County Civil Service Commission; WILLIAM LANDMAN, individually and for actions taken under color of his office as Commissioner of Sanitation of the Town of Hempstead; HAROLD HAFF, individually and for actions taken under color of his office as Highway Commissioner of the Town of Hempstead; WILLIAM PHEARS, individually and for actions taken under color of his office as Water Commissioner of the Town of Hempstead, HAROLD UDELL, individually and for actions taken under color of his office as Commissioner of Conservation and Waterways of the Town of Hempstead; RAYMOND GRABER, individually and for actions taken under color of his office as Deputy Commissioner of Conservation and Waterways of the Town of Hempstead; GARDINER S. McMULLEN, individually and for actions taken under color of his office as Commissioner of Parks and Recreation of the Town of Hempstead; JOHN HANSEN, individually and for actions taken under color of his office as Deputy Commissioner of Parks and Recreation of the Town of Hempstead; AUGUST COSENZA, individually and for actions taken under color of his office as an Assistant Sanitation Supervisor of the Town of Hempstead; THE TOWN OF HEMPSTEAD; THE COUNTY OF NASSAU; and JOHN DOE, representing certain other, as yet, unknown agents of the County of Nassau, the Town of Hempstead, the Nassau County Republican Committee, the Town of Hempstead Republican Committee, and the Village of Hempstead Republican Committee,

Defendants.

Questions Presented.

1. Whether Petitioners, which are unincorporated, political associations, are "persons" within the meaning of the Racketeer Influenced and Corrupt Organizations Act ("RICO")?

2. Whether application of the civil RICO statute to an unincorporated, political association's fund-raising activities is violative of the First Amendment?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986.

No.

THE NASSAU COUNTY REPUBLICAN COMMITTEE and THE TOWN OF HEMPSTEAD REPUBLICAN COMMITTEE,

Defendants-Petitioners,

against

LORRAINE C. CULLEN; JOHN L. JUND; and MICHAEL LANDI, on behalf of each, and on behalf of all persons similarly situated; namely, those employees of the County of Nassau; the Towns of Hempstead, and Oyster Bay; and the Village of Hempstead, who have been subjected to solicitations for campaign contributions to the Republican Party in an inherently coercive manner or who have been subjected to scrutiny by officials of the Republican Party in connection with their hiring, employment or promotion; and CIVIL SERVICE MERIT COUNCIL OF LONG ISLAND,

Plaintiffs-Respondents,

and

THE TOWN OF HEMPSTEAD and THE COUNTY OF NASSAU,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI.

Petitioners the Nassau County Republican Committee and the Town of Hempstead Republican Committee respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered this case.

OPINIONS BELOW.

Insofar as is relevant to the present application, the Court of Appeals vacated a judgment of the United States District Court for the Eastern District of New York (Mishler, J.) dismissing plaintiffs' claims under 18 U.S.C. §1964(c) and remanded the matter to the district court for further proceedings. The Court of Appeals' opinion is reported at 811 F.2d 698 (2d Cir. 1987) and is set forth in the Appendix at 1b. The post-trial opinion of the District Court is set forth in the Appendix at 1c. This case previously was the subject of an appeal, which was dismissed by the Court of Appeals. The opinion relating to that dismissal is reported at 618 F.2d 226 (1980) (per curiam).

JURISDICTION.

The judgment of the Court of Appeals was entered on February 2, 1987. (1a). This petition is filed within ninety (90) days after the entry of that judgment. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS.

The First Amendment to the United States Constitution is set forth in the Appendix at 1d. The relevant provisions of the Racketeering Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C. §§1961(3), (4), 1962(c) and 1964(c)) are set forth in the Appendix at 1e. Moreover, inasmuch as this case challenges the constitutionality

of RICO as applied to Petitioners, 28 U.S.C. §2403(a) may be applicable. No court has certified to the Attorney General that the constitutionality of RICO has been questioned.

STATEMENT OF CASE.

A. INTRODUCTION.

By reinstating plaintiffs RICO claims against Petitioners, the Court of Appeals has sanctioned an unprecedent and extremely dangerous application of a quasi-criminal statute to a political party's fundraising activities. If allowed to stand, the ruling by the Court of Appeals not only permits a direct intrusion on the First Amendment rights of Petitioners' memberships, but poses a direct threat of criminal prosecution to all political organizations.

Petitioners are unincorporated associations consisting of approximately 2,000 individuals who are elected every two years by the registered voters in each local area. The Petitioners' primary activities are the raising of funds and solicitation of votes for candidates of the Republican Party.

The Court of Appeals' recognition of plaintiffs' RICO claims was based exclusively on a jury finding that certain agents of the Petitioners engaged in acts of extortion over ten years ago. Nevertheless, liability will be imposed on Petitioners' present memberships which, both factually and legally, are five elections removed from any acts of wrongdoing.

Under the Court of Appeals' holding, individuals who have joined or wish to join the ranks of Petitioners' membership do so at the risk of being labeled "racketeers"

and being subjected to treble damage claims for acts that occurred over a decade ago. Such a ruling has had and will continue to have a chilling effect on the free exercise of political association and fundraising.

Earlier this Term, this Court reaffirmed that the dual rights of free political association and free speech, in the form of independent political expenditures, are at the very core of the First Amendment. *Federal Election Commission v. Massachusetts Citizens for Life, Inc.,* 107 S.Ct. 616 (1986); *Tashjian v. Republican Party of Connecticut,* 107 S.Ct. 544(1986). The ruling of the Court of Appeals is in conflict with both the spirit and rationale of these recent decisions.

The application of civil RICO to an unincorporated political association involves important issues of constitutional law that impact upon all political organizations. Because the ruling by the Court of Appeals strikes at the very heart of the electoral process and the freedoms guaranteed by the First Amendment, the present case merits review by this Court.

B. STATEMENT OF ESSENTIAL FACTS.[1]

1. *History of Case*

On December 2, 1974, plaintiffs, "for themselves and on behalf of all persons similarly situated," commenced an action in the New York State Supreme Court against, *inter alia,* Petitioner The Nassau County Republican Committee (E. 437-446). The plaintiffs alleged that they were forced to make contributions to the Republican

[1]References herein to "A" are to the Appendix to the Petition; references to "C.A." are to the Appendix filed in the Court of Appeals; references to "E." are to the Exhibits which are part of the Appendix filed in the Court of Appeals.

Party to obtain public employment or promotions within such employment. *Id.* Plaintiffs requested that their contributions be refunded, as well as declaratory and injunctive relief against defendants' activities. (E. 445-446).

The New York State Supreme Court denied plaintiffs' request for class certification and dismissed their complaint for failure to state a cognizable claim against Petitioner. *Cullen v. Margiotta,* 81 Misc.2d 809 (Sup. Ct. Nassau County 1975), *aff'd* 59 A.D.2d 831 (2d Dep't 1977).

Following dismissal of their action by the New York State Supreme Court, plaintiffs filed the present class action in the Eastern District of New York on December 14, 1976. (C.A. 25-38). The gravamen of plaintiffs' complaint was that governmental units within Nassau County engaged in a practice whereby individuals seeking appointment to or promotion within municipal employment were required to contribute one per cent (1%) of their salary to Petitioners. *Id.*[2] The plaintiffs premised federal jurisdiction under 42 U.S.C. §1983 and requested class certification, damages and declaratory relief. (CA. 35-38).

On June 27, 1977, the district court denied Petitioners' motion to dismiss the complaint and certified the plaintiff class under Rule 23(b)(1) of the Federal Rules of Civil Procedure. *Cullen v. New York State Civil Service Commission,* 435 F. Supp. 546 (E.D.N.Y. 1977). The district court ruled that the earlier dismissal and denial of class certification by the New York State Supreme Court were not entitled to full faith and credit and should not be given *res judicata* effect. 435 F. Supp. at 552-555; 562 n.12. Judge

[2]It is an undisputed fact that for over forty (40) years municipal employees of the County of Nassau and Town of Hempstead have engaged in a custom of contributing a percentage of their salaries to the local political party.

Mishler also ruled that plaintiffs had stated a First Amendment claim, cognizable under 42 U.S.C. §1983. *Id.* at 551-552. Moreover, the district court ruled that the court could exercise jurisdiction over Petitioners because, even though private parties, they were alleged to have "acted in concert" with state officials in violating plaintiffs' constitutional rights. *Id.* at p. 558.

On May 9, 1978, plaintiffs served an amended complaint. (C.A. 132). Plaintiffs asserted six (6) causes of action seeking relief under various statutes, including 42 U.S.C. §1983 and, for the first time, damages under 18 U.S.C. §1964, the Racketeer Influenced Corrupt Organizations Act ("RICO"). With respect to RICO, the amended complaint alleged that the "Republican Party Defendants" violated "18 U.S.C. §1962 and 18 U.S.C. §1951" by coercing contributions from public employees (C.A. 159).[3] According to the amended complaint, these contributions were "used or invested . . . in the operation of the Nassau County Republican Party and its affiliates, enterprises engaged in and affecting interstate commerce." *Id.* The plaintiffs specifically alleged that the Republican Party Defendants "conducted or participated" in the affairs of the Nassau County Republican Party and its affiliates "through a pattern of coerced campaign contributions." *Id.* The amended complaint, however, did not specify any particular predicate acts violative of 18 U.S.C. §1951, the Hobbs Act.

[3]The amended complaint identified the "Republican Party Defendants" as:

> "The Nassau County Republican Committee; The Town of Hempstead Republican Committee; The Village of Hempstead Republican Committee; Joseph P. [*sic*] Margiotta, Jr.; Andrew Parisi; Howard Levitt; Easa Easa; Stanley Krause; Donald Woolnough; Isabel Dodd; Robert Livingston, Jr.; and Arlene Mathewson (C. 157). Plaintiffs voluntarily discontinued their action against all of these defendants except Petitioners.

By decision and order, dated April 30, 1979, the district court dismissed various causes of action, including the RICO claims. (C.A. 190-238). According to the district court, because plaintiffs' allegations failed to set forth, in any manner, how Petitioners extortionate activities "affected" interstate commerce within the meaning of 18 U.S.C. §1951, their claims under 18 U.S.C. §1964 had to be dismissed. (C.A. 206-214).

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the district court directed that the various dismissals of plaintiffs' claims be embodied in a partial judgment (C.A. 235). On March 25, 1980, the Court of Appeals dismissed the appeal taken as of right by plaintiffs from this partial judgment, ruling that the district court's certification under Rule 54(b) was "an abuse of discretion." *Cullen v. Margiotta,* 618 F.2d 226, 228 (2d Cir. 1980).

Notwithstanding a lack of jurisdiction, the Court of Appeals was compelled to comment that, when dismissing plaintiffs' RICO claims, the trial court failed to "consider whether a pervasive pattern of extortion, in the aggregate, would have the requisite impact on interstate commerce." *Id.* at 227 n.2. Based solely on this footnoted comment, the district court reinstated plaintiffs' RICO claims on April 15, 1985, (i.e., three months before trial commenced), advising Petitioners that these claims would be submitted to the jury. (C.A. 794).

Petitioners then filed an omnibus motion for summary judgment. Among other things, Petitioners argued that, as unincorporated associations, they had no legal existence independent of the persons who comprise their membership and, thus, were not legal entities that could be sued by plaintiffs. (C.A. 304-351). Rejecting both federal and New York State common law concerning the substantive liabil-

ity of unincorporated associations, the district court ruled that Petitioners' liability under 42 U.S.C. §1983 was to be determined in accordance with the standards set forth in *Monell v. Department of Social Services,* 436 U.S. 658 (1978). (C.A. 402-406). As to plaintiffs' RICO's claims, the district court also denied Petitioners' motion to dismiss, but with leave to renew pending the decision by this Court in *Sedima v. Irmex Company, Inc.,* 105 S.Ct. 3275 (1985) (C.A. 408-409).

2. *The Trial of Plaintiffs' Claims*

The liability phase of the case was tried before a jury during the period July 29, 1985 through September 4, 1985. Because plaintiffs' RICO claims had been brought back into the case only three months earlier, Petitioners were guided solely by the general and conclusory allegations of plaintiffs' amended complaint to the effect that they conducted an enterprise consisting of the "Republican Party and its affiliates" through a series of predicate Hobbs Act violations. (C.A. 159-60). Because of the extreme vagueness of the RICO allegations, the district court directed plaintiffs to furnish specific predicate crimes and to detail the "enterprise" theory upon which the RICO claims were based. Unfortunately, and over vehement objection, Petitioners only received notice of the specifics of the RICO claims one day before summations. (C.A. 2656).

The district court permitted the jury to consider five (5) different RICO "enterprises" consisting of various permutations of associations-in-fact consisting of the Petitioners, the County of Nassau and the Town of Hempstead. (C.A. 749-751). The district court specifically instructed the jury that Petitioners could be held liable for the unauthorized, illegal and criminal acts of their agents,

provided such acts were within their actual or "apparent" scope of authority. (C.A. 2701-2702; 2719-2720; 2787-2789).

On September 4, 1985, the jury returned its Special Verdict. (A. 20c to 33c). The jury found that the Petitioners and The Town participated in a practice and procedure of coercive solicitation during the period "January 1, 1973 to January 1, 1976." (A. 20c to 21c). Unlike employees of the Town, the jury specifically found that there was not a "substantial number" of County employees who understood that they were expected to contribute one percent (1%) of their annual salaries to the Republican Party. (A. 21c). The jury completely exonerated Nassau County from any wrongdoing as alleged by plaintiffs. (A. 21c-22c).

The jury also found that any coercive practice and procedure of soliciting contributions from public employees did not continue "to the relatively recent past." (A. 23c). Finally, rejecting plaintiffs' RICO claims, the jury refused to find that any of the defendants knowingly and willfully conducted or participated directly or indirectly in the conduct of the affairs of the RICO "enterprises" presented for consideration. (A. 27c to 30c).

3. *The District Court's Rulings*

Consistent with the jury's findings that plaintiffs failed to establish that any defendant was an entity associated with an enterprise which, through a pattern of illegal activity, participated in the conduct of any enterprise's affairs, the district court dismissed the RICO claims against all defendants (A. 9c to 12c). Furthermore the district court stated that plaintiffs had failed to establish the ex-

istence of any RICO enterprise distinct from "the pattern of racketeering activity." (A. 10c to 11c, *quoting United States v. Turkette,* 452 U.S. 576, 583 (1981).)

With respect to plaintiffs' request that the district court find, based on a new theory, that Petitioners and the Town participated in an enterprise consisting of themselves, the court first noted that the jury was asked "all the enterprised posited by the plaintiffs." (A. 11c). The Court went on to emphasize that the case was tried on the theory that each defendant entity was the RICO "person" with the "enterprise" consisting of the other three (3) entity defendants and that the Special Verdict, "agreed upon by counsel," followed this theory. (A. 11c). Nor would the court permit plaintiffs to amend their theory of RICO liability to add a new enterprise "at this late date" since "defendants were entitled to notice of the allegation against which they must defend." (A. 12c).

Given the limited scope of the district court's holding, it did not reach the First Amendment issues raised by Petitioners with respect to application of RICO to an unincorporated, political association. A partial judgment was entered, dismissing, *inter alia,* plaintiffs' RICO claims (A. 756-760).

4. *The Court of Appeals' Decision.*

The Court below rendered its decision on February 2, 1987 (A. 1b). First, the Court of Appeals dismissed Petitioners' cross-appeals on jurisdictional grounds, once again denying them review of their challenges to plaintiffs' claims under 42 U.S.C. §1983, the propriety of the district court's class certification and a host of other issues. (A. 15b). On plaintiff's appeal, however, the court below rendered very significant rulings.

Although recognizing Petitioners' status as unincorporated, political associations and readily acknowledging the anti-criminal intent behind and punitive nature of RICO, the Court of Appeals nevertheless allowed plaintiffs to prosecute their RICO claims against Petitioners (A. 58b to 68b). Specifically, the Court of Appeals ruled that the district court "erred in dismissing the RICO claims on the basis of the answers given by the jury to the special interrogatories, because those answers left a gap that should have been filled by the court." (A. 14b). Furthermore, finding that there was no "conflict" with federal law, the Court of Appeals held that plaintiffs were entitled to a toll of the statute of limitations so as to permit consideration of RICO claims against petitioners that accrued as early as 1970. (A. 58b to 59b).

Notwithstanding that the jury refused to find that Petitioners were entities associated with any RICO "enterprise," the Court of Appeals concluded that the dismissal of plaintiffs' RICO claims was "factually, doctrinally and procedurally flawed." (A. 62b). According to the Court of Appeals, regardless of the extremely vague RICO allegations set forth in the amended complaint and even though plaintiffs expressly agreed to have these claims presented to the jury on a particular "enterprise" theory, the district court must still decide, in a post-verdict setting, new bases of RICO liability against petitioners predicated upon theories that the jury was never asked to consider. (A. 62b to 68b).

The Court of Appeals has remanded the matter to the district court for "factual findings" as to whether the evidence at trial establishes "any" RICO claim against Petitioners. (A. 68b). Moreover, relying on language from *Sedima,* the court below has directed that this factual determination is to be made based on the "preponderance

of the evidence" standard, even though plaintiffs' RICO claims challenge Petitioners' constitutionally protected First Amendment right to solicit contributions from public employees. (A. 68b).

Purely by way of obiter, the Court of Appeals was compelled to comment that the trial record "strongly suggest[ed]" that the jury would have found petitioners liable under RICO if the proper special interrogatories had been posed by plaintiffs. (A. 65b). Thus, for all practical purposes, the so-called "factual findings" to be made by the district court already have been dictated by the Court of Appeals.

Although presented with alternative grounds for affirming the dismissal of plaintiffs' RICO claims, the Court of Appeals eschewed all consideration of the important constitutional and statutory arguments arising out of Petitioners' status as unincorporated, political associations. Rather, the Court of Appeals summarily "declined to address these arguments," electing to await for a "new final judgment fully adjudicating the RICO claims." (A. 71b to 72b). Unfortunately, the district court consistently has rejected these arguments in deciding previous motions by petitioners. (C.A. 402-406). More importantly, in a case that the district court has admitted will last many years (A. 20c), Petitioners will remain stigmatized by the label of being "racketeers".

The district court has expressed the view that Petitioners' solicitation of contributions from public employees already has been altered significantly as a result of this class action. (C.A. 2889). Indeed, in a broader sense, the fundraising efforts of all political associations will operate under a pall of quasi-criminal liability unless this Court reviews the First Amendment issues arising out of this case.

REASONS FOR GRANTING THE PETITION.

I. The Decision Below Raises Issues of Great Importance to the Political Process and to the Right to Solicit Political Contributions.

By enacting RICO some seventeen (17) years ago, Congress sought "the eradication of organized crime in the United States . . . by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." *Organized Crime Control Act of 1970,* Pub. L. No. 91-452, 84 Stat.922 (1970) (Statement of Purpose), *reprinted in* 1970 U.S. Code Cong. & Ad. News 1073. Over the past few years, however, civil RICO has been "evolving into something quite different from the original conception of its enactors." *Sedima, S.P.R.L. v. Irmex Company, supra,* 105 S.Ct. at 3287.

Application of RICO in the present case is not simply another step in this evolutionary departure from Congressional intent. Indeed, it defies reason to suggest that Congress even foresaw, let alone intended, that RICO would be utilized to challenge the fund-raising activities of a political party.[4] Rather, utilization of this quasi-criminal statute against Petitioners represents a dangerous intrusion into the very core of the First Amendment.

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[4]It is worth noting that of all legislative restrictions imposed upon the activities of political parties, none has been predicated upon the Commerce Clause. *See generally* Kester, *Constitutional Restrictions on Political Parties,* 60 Va. L. Rev.735 (1974).

The Court of Appeals has sustained the application of RICO to Petitioners in a manner that seriously conflicts with prior decisions of this Court. Essentially, the court below has held that Petitioners may be held liable as "persons" under RICO based on the commission of a series of Hobbs Act violations committed by nine individuals over a decade ago. (A. 24c to 26c). Although Petitioners are unincorporated associations, such liability is premises solely and erroneously upon the theory of *respondent superior. See* p. 9, *supra.*[5]

As a result of the decision reached by the court below, plaintiffs may now proceed to recover, as a class, treble damages, attorneys fees and, perhaps, punitive damages against Petitioners based upon annual campaign solicitations spanning the years 1970 through 1976. Any public employee who contributed to Petitioners during this period presumptively is a victim of Petitioners' "racketeering", with the burden thrust upon Petitioners to establish that the funds received were the product of voluntary donations (A. 15c to 16c).

As discussed below, this court has steadfastly protected the fundamental First Amendment rights of a political party both to solicit funds and to operate freely in the

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[5]Over objection, the jury was charged that Petitioners could be held vicariously liable for the criminal acts of their agents acting within the "apparent scope" of their authority. (C.A. 2787-2789). However, an unincorporated association, not being a "jural person", can only be held liable for the acts of its members where there has been ratification of those acts by the association's membership. *United States v. White,* 322 U.S. 694, 702 (1944); *Sperry Products, Inc. v. Association of American Railroads,* 132 F.2d. 408, 410 (2d Cir. 1942), *cert. denied* 319 U.S.744 (1943); *Martin v. Curran,* 303 N.Y. 276, 101 N.E. 2d 683 (1951). Plaintiffs voluntarily discontinued their claims against the individual "persons" who actually committed the predicate Hobbs Act violations, electing instead to pursue their action solely against Petitioners.

electoral process. This Court has been vigilant in subjecting any regulation of a political party to the most exacting scrutiny. Similarly, this Court has not hesitated in striking down efforts that have even the potential of deterring members of a political party from freely associating to advance the goals of their candidates.

The Court of Appeals holding jeopardizes the rights of Petitioners' memberships to associate freely and to solicit campaign contributions from public employees. Whether and to what extent RICO can be employed against an unincorporated, political association are important issues, impacting on the electoral process as a whole, which should be reviewed by this Court.

II. Unincorporated, Political Associations Are Not "Persons" under RICO.

Petitioners are unincorporated associations which derive their existence from the New York Election Law. *See N.Y. Elec. Law* §§2-104 through 2-110. Being creatures of statute, Petitioners are a collection of approximately 2,000 individuals who must run for election every two (2) years. (C.A. 2694-2695). Thus, during the relevant time period, the membership of Petitioners was in a constant state of flux. Moreover, Petitioners current members are not the same individuals who were members when this action was first commenced.

The jury in this case essentially found that any wrongdoing as alleged by plaintiffs ceased in 1976. (A. 23c). Nevertheless, based on a finding of prior wrongdoing, plaintiffs seek to enter a judgment for treble damages, not against the "flesh and blood" individuals actually involved, but against the present political Committees which, having been reconstituted biennially pursuant to the Election Law, are five legal generations removed from the activities in question.

Under the common law of New York, an unincorporated association, such as a county committee of a political party, is not a legal entity and, as such, has no existence independent of the persons who comprise its membership. *96 Fifth Avenue Realty Corp. v. Greenberg,* 180 Misc.614, 44 N.Y.S.2d 231 (N.Y.C. Mun.Ct.1943), *aff'd,* 181 Misc.2d 142, 47 N.Y.S.2d 222 (Sup.Ct.App.T. 1st Dep't 1944); see *Martin v. Curran, supra,* 303 N.Y. 276; *In re New York Times Company,* 2 A.D.2d 31, 152 N.Y.S.2d 884, 886 (1st Dep't 1956). See also, *United States v. White, supra,* 322 U.S. at 702; *Sperry Products, Inc. v. Association of American Railroads, supra,* 132 F.2d at 410.

Plaintiffs alleged in their complaint and then proceeded to establish at trial that Petitioners violated 18 U.S.C. §1962(c). That provision states:

> "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

Under subdivision (3) of section §1961, a "person" is defined as "any individual or entity capable of holding a legal or beneficial interest in property." Under subdivision (4) of §1961 an "enterprise" is more broadly defined as:

> "any individual, partnership, corporation, *association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.*" (emphasis supplied).

Petitioners, being unincorporated associations, are merely groups of individuals joined together by similar political beliefs. Indeed, the very definitions set forth in §1961 distinguish between a "person" and an "enterprise." The phrase "enterprise" includes associations in fact, while the word "person" is limited to individuals and entities capable of possessing property.

As unincorporated associations, Petitioners simply do not meet the RICO definition of "person." Neither Petitioner is an "individual" nor "an entity capable of holding a legal or beneficial interest in property." *See generally* 6 N.Y. Jur.2d, *Associations and Clubs,* §6, p.329 (1980) (and cases cited therein at n.44).

More fundamentally, Petitioners are reconstituted every two years pursuant to the New York Election Law. Thus, assuming *arguendo,* that a political committee is a legal *entity* capable of possessing property, RICO liability cannot be imposed on the present Republican Committee because they are not the same "persons" that engaged in the racketeering activities that took place over ten years ago.

A review of the amended complaint confirms that Petitioners are not the "persons" upon whom plaintiffs sought to impose RICO liability. Paragraph "94" of the amended complaint refers to Petitioners (i.e., "The Nassau County Republican Party and its affiliates") as the "enterprises engaged in and affecting interstate commerce" and the "enterprises" in which certain individual defendants, who were voluntarily dismissed from the case, "participated" or "conducted."

To the extent that the Court of Appeals sanctioned plaintiffs' efforts to concoct "enterprises" and post-trial theories of "participation" different from those alleged in

the amended complaint, such a "variance" in a criminal case would result in the dismissal of the indictment. *United States v. Huber,* 603 F.2d 387, 394 (2d Cir.1979); *see also United States v. Bertolotti,* 529 F.2d 149, 155-57 (2d Cir.1975). The same result should obtain here inasmuch as a defendant in a RICO action, which is a quasi-criminal proceeding, is entitled to the same protections as are afforded in a criminal prosecution. *See Sedima, S.P.R.L. v. Imrex Co., supra,* 105 S.Ct. at 3283. In fact, given the impact on Petitioners' First Amendment rights, the need for procedural protection is even greater.

Finally, the Second Circuit's decision that Petitioners can be held liable as "persons" under RICO appears to conflict with the Seventh Circuit's decision in *Horoco v. American National Bank & Trust Company,* 747 F.2d 384 (7th Cir. 1984), *aff'd* 105 S.Ct. 3291 (1985). In *Horoco,* the Seventh Circuit held that an "association in fact" cannot be a "person" for purposes of RICO because it cannot "hold any interest in property or even be brought into court." 747 F.2d at 401.

III. Application of RICO to Petitioners is Violative of the First Amendment.

A. Petitioners' Right to Solicit Contributions.

This Court has confirmed that the solicitation of funds from public employees is a form of speech protected by the First Amendment. *Cornelius v. NAACP,* 473 U.S. 788 (1985). Furthermore, any regulation of such solicitation must be measured against "the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views . . . and for the reality that without solicitation the flow of such information and advocacy would likely cease." *Village of Schaumburg v. Citizens for Better Environment,* 444 U.S. 620, 632 (1980).

Particularly where, as in the present case, face-to-face solicitation is involved, First Amendment protections are to be assiduously guarded because there is "a greater opportunity for the exchange of ideas and the propogation of views." *Cornelius v. NAACP, supra,* 473 U.S. at 802. *Federal Election Commission v. National Conservative Political Action Committee,* 470 U.S. 480 (1985); *Buckley v. Valeo,* 424 U.S. 1 (1976).

Earlier this Term, this Court held section 316 of the Federal Election Campaign Act unconstitutional as applied to a nonprofit corporation's distribution of a newsletter advocating certain candidates in a Massachusetts primary. *Federal Election Commission v. Massachusetts Citizens for Life, Inc., supra,* 107 S.Ct. 616. In so doing, this Court reasoned that the restrictions imposed by the Act (*i.e.,* record-keeping and reporting of political expenditures) had the potential of discouraging a group of like-minded individuals from seeking political contributions. Id. at 626. The fact that the statute could potentially discourage such free speech, without more, was sufficient for this Court to conclude that the First Amendment was abridged by this enactment.

In the present case, the Court of Appeals has sustained Petitioner's liability under RICO based upon acts of extortion committed by certain agents purportedly acting for Petitioners within the "apparent" scope of their authority. (C.A. 2701, 2703, 2707, 2780). As sustained by the Court of Appeals, the jury's funding of RICO liability relates directly to all solicitations for contributions from public employees within the Town of Hempstead and the County of Nassau during the period 1970 through 1976. The effect of this ruling necessarily impinges upon legitimate efforts to garner support for candidates of the Republican Party.

As such, the imposition of RICO liability upon Petitioners clearly infringes upon protected speech. The potential of being stigmatized as a "racketeer" and cast in treble damages has and will continue to deter Petitioners' membership from soliciting contributions from any public employees. Such a chilling effect on the robust exercise of free political speech simply cannot withstand scrutiny under the First amendment.

B. Petitioners' Right to Free Political Association.

Petitioners are, in reality, nothing more than a group of individuals who have voluntarily joined together to advance similar political beliefs and goals. In so doing, Petitioners members are exercising a right that is "an integral part of [the] basic constitutional freedom" guaranteed by the First Amendment. *Tashjian v. Republican Party of Connecticut, supra,* 107 S.Ct. 544, 548-49; *NAACP v. Alabama,* 357 U.S. 449 (1958). Any interference with Petitioners' activities necessarily entails interference with the freedom of their members. *Democratic Party v. Wisconson,* 450 U.S. 107, 122 (1981).

In the present case, the Court of Appeals has ruled that Petitioners may be held liable under RICO based on events that transpired over a decade ago. Yet, as noted earlier, Petitioners are composed of individuals who are removed, both factually and legally, from any predicate criminal activity by at least five elections. Imposition of RICO liability on Petitioners' present memberships, who have engaged in no wrongdoing, simply penalizes them for exercising their constitutionally protected right of free political association. *Cf. NAACP v. Claiborne Hardware Company,* 458 U.S. 886, 920 (1982) ("[c]ivil liability may not be imposed merely because an individual belonged to a group, some members of which committed [unlawful acts]").

Faced with the specter of racketeering liability, individuals clearly will be dissuaded from joining or continuing in Petitioners' memberships. Such a result abrogates the freedom to associate politically.

CONCLUSION.

For the reasons stated, the Petition should be granted.

Respectfully submitted,

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